

PROPOSED AMENDED DISABILITY REGULATIONS
As Adopted by the Commission on October 3, 2011

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4. Fair Employment & Housing Commission

Chapter 1. Administration

Subchapter 9. Disability Discrimination

§ 7293.5. General Prohibitions Against Discrimination on the Basis of Disability.

- (a) Statutory Source. These regulations are adopted by the Commission pursuant to Sections 12926, 12926.1 and 12940 of the Government Code.
- (b) Statement of Purpose. The Fair Employment and Housing Commission is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ~~assure~~ ensure discrimination-free access to employment opportunities notwithstanding any individual's ~~actual or perceived~~ disability; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual, perceived or potential physical or mental disability or medical condition. The definition of "disability" in these regulations shall be construed broadly in favor of expansive coverage by the maximum extent permitted by the terms of the Fair Employment and Housing Act. ("FEHA") As with the Americans with Disabilities Act of 1990 (Public Law 10-336) ("ADA"), as amended by the ADA Amendment Act of 2008 (Public Law 110-325), the primary object of attention in cases brought under the FEHA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis.
- (c) Incorporation of General Regulations. These regulations governing discrimination on the basis of disability incorporate each of the provisions of Subchapters 1 and 2 of Chapter 2, unless specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 7293.6. Definitions.

As used in this subchapter, the following definitions apply:

(a) ~~"Disability" means and includes:~~

~~(1) "Physical disability," as defined in Government Code Section 12926, subdivision (k), and~~

~~Section 7293.6, subdivision (e), herein; and~~

~~(2) “Mental disability,” as defined in Government Code Section 12926, subdivision (i), and Section 7293.6, subdivision (f), herein; and~~

~~(3) “Medical condition,” as defined in Government Code Section 12926, subdivision (h), and Section 7293.6, subdivision (g), herein; and~~

~~(4) “Disability,” as used in the Americans with Disabilities Act of 1990 (Public Law 101-336) (“ADA”), if:~~

~~(A) the ADA definition of “disability” would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k) of Government Code Section 12926; or~~

~~(B) the ADA definition of “disability” would include any medical condition not included within subdivision (i) or (k) of Government Code Section 12926.~~

(a) “Assistive animal” means a trained animal, including a trained dog, as defined at Civil Code section 54.1, necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) “Guide” dog trained to guide a blind or visually impaired person.

(B) “Signal” dog or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) “Service” dog or other animal individually trained to the requirements of a person with a disability.

(D) “Support” dog or other animal trained to provide emotional or other support to a person with a disability, including but not limited to traumatic brain injuries or mental disabilities such as major depression.

(2) Minimum Standards for Assistance Animals. Employers may require that any assistive animal in the workplace:

(A) display public appropriateness of cleanliness, grooming, and toilet habits;

(B) display non-disruptive behavior, including not soliciting food or attention, no unnecessary vocalizing, and no aggression towards people or other animals; and

(C) be trained to provide assistance for the employee’s disability, to do so in public and to obey the employee’s verbal and non-verbal commands.

(b) ~~“Disability” does not include:~~

~~(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;~~

~~(2) Compulsive gambling, kleptomania, or pyromania; or~~

~~(3) Psychoactive substance use disorders resulting from current illegal use of drugs.~~

(b) “CFRA” means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this part, “CFRA leave” means medical leave taken pursuant to CFRA.

~~(e) Homosexuality and bisexuality are not impairments and as such are not disabilities.~~

(c) “Disability” shall be broadly construed to mean and include any of the following definitions:

(1) “Mental Disability,” as defined at Government Code section 12926, subdivision (i), includes, but is not limited to, all of the following: having any chronic or episodic mental or psychological disorder or condition, such as emotional or mental illness, intellectual or cognitive disability, organic brain syndrome, clinical depression, bipolar disorder, or specific learning disabilities that limits a major life activity.

(A) “Intellectual or cognitive disability” was formerly referred to as “mental retardation.”

(B) A “specific learning disability” is a disorder in one or more of the basic mental processes involved in understanding or in using spoken or written language and includes the definition used by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., and its implementing regulations, at 34 C.F.R. § 300.8.

(2) “Physical Disability,” as defined at Government Code section 12926, subdivision (k), includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and

(B) limits a major life activity.

(C) “Disability” includes, but is not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease.

- (3) A “special education health impairment” is any other present mental or psychological disorder or physical condition not described in section 7293.6, subdivisions (c)(1) or (c)(2), of this part, that requires special education or related services, including those conditions defined as disabilities in the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., and its implementing regulations, at 34 C.F.R. § 300.8.
- (4) “Record or History of Disability.” Previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware, either directly or indirectly.
- (5) “Regarded as”, “Perceived as” or “Treated as” Having a Disability. Being subjected to an action prohibited by this part, including non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, or special education health impairment, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity. Proof that the individual was subjected to a prohibited employment action, e.g., excluded from one job, because of a condition (other than a “temporary” condition as defined at section 7293.6, subdivision (c)(9)(B)) is sufficient to establish coverage under the “regarded as” or “perceived as” definition.
- (6) “Regarded as”, Perceived as”, or “Treated as” Having a Potential Disability. Being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, or special education health impairment that has no present disabling effect, but may become a mental or physical disability or special education health impairment.
- (7) “Medical condition,” is a term specifically defined at Government Code section 12926, subdivision (h), to mean either:
- (A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or
- (B) a “genetic characteristic,” as defined at Government Code section 12926, subdivision (h)(2). In addition, genetic characteristic can mean genetic information derived from any or all of the following: an individual’s genetic tests; the genetic tests of family members; the manifestation of a disease or disorder in family members of such individual; receipt of genetic counseling or genetic education by the individual or a family member.
- (8) “Disability,” as used in the Americans with Disabilities Act of 1990 (Pub. Law 101-336) (“ADA”), and as amended by the ADA Amendments Act of 2008 (Pub. Law 110-325) and the regulations adopted pursuant thereto, may result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition, and if so, then the broader ADA protections or coverage shall be deemed incorporated by reference

into, and shall prevail over conflicting provisions of the Fair Employment and Housing Act's definition of disability.

(9) "Disability" does not include:

(A) excluded conditions listed at Government Code section 12926, subdivisions (i) and (k), including "sexual behavior disorders," as defined at section 7293.6, subdivision (o), of this part; or

(B) conditions that are mild, temporary, non-chronic conditions of short duration, with little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, bruises, or abrasions; and minor and non-chronic gastrointestinal disorders because they usually will not limit a major life activity.

~~(d) The unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability or a mental disability.~~

(d) A "disorder" is a mental or physical condition in which there is a disturbance of normal functioning of the mind or body.

~~(e) "Physical disability"~~

~~(1) "Physical disability" includes, but is not limited to, all of the following:~~

~~(A) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:~~

~~1) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.~~

~~2) Limits an individual's ability to participate in major life activities.~~

~~a) "Major Life Activities" are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement.~~

~~(B) Any other health impairment not described in paragraph (A) that requires special education or related services.~~

~~(C) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (A) or~~

~~(D) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (A) or (B).~~

~~(2) It is the intent of the Legislature that the definition of “physical disability” in Government Code Section 12926, subdivision (k), and in this subdivision, shall have the same meaning as the term “physical handicap” formerly defined by Government Code Section 12926 and construed in *American National Ins. Co. v. Fair Employment & Housing Com.*, (1982) 32 Cal.3d 603.~~

(e) “Essential job functions,” as defined more fully at section 7293.8, subdivision (f), means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

~~(f) “Mental disability” includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.~~

(f) “Family member,” for purposes of discrimination on the basis of a genetic characteristic, includes the individual’s relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents.

~~(g) “Medical condition” includes any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.~~

(g) “FMLA” means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. § 825, as amended November 4, 2008. For purposes of this section only, “FMLA leave” means medical leave taken pursuant to FMLA.

(h) “Health care provider” means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California, or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

(2) any other persons, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants or others who meet the definition of “others capable of providing health care services” under FMLA and its implementing regulations; or

(3) a health care provider from whom an employer, other covered entity, or a group health plan’s benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

- (i) “Interactive process,” as set forth more fully at California Code of Regulations, title 2, section 7294.1, means timely, good faith communication between the employer or other covered entity and the applicant or employee or his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant’s or employee’s disability and, if so, how the person can be reasonably accommodated.
- (j) “Major Life Activities” shall be broadly construed and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.
- (1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.
- (2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.
- (3) An impairment “limits” a major life activity if it makes the achievement of the major life activity difficult.
- (A) Whether achievement of the major life activity is “difficult” is an individualized assessment measured against what most people in the general population can perform with little or no difficulty.
- (B) The comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific, medical, or statistical analysis.
- (C) “Limits” shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
- (D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.
- (E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.
- (k) A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental disabilities or health.

(l) “Mitigating measure.” A treatment, therapy, or device which eliminates or reduces the limitation(s) of a disability.

(1) Mitigating measures include, but are not limited to:

(A) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; or assistive animals, such as guide dogs.

(B) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(C) Reasonable accommodations or “auxiliary aids and services,” which include:

1) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities;

2) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities;

3) acquisition or modification of equipment or devices; and

4) other similar services and actions.

(D) Learned behavioral or adaptive neurological modifications.

(E) Surgical interventions, except for those that permanently eliminate a disability.

(F) Psychotherapy, behavioral therapy, or physical therapy.

(m) “Qualified Individual”, for purposes of disability discrimination under California Code of Regulations, title 2, section 7293.7, is an applicant or employee who proves that s/he has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(n) “Reasonable accommodation” is any change in the work environment or in the way a job is customarily sought or done that:

(1) is effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(2) is effective in enabling an employee to perform the essential functions of the job the employee holds or desires.

(o) “Sexual behavior disorders,” as used in this part, refers to pedophilia, exhibitionism, and voyeurism.

(p) “Undue hardship” means significant difficulty or expense, considered in light of the factors detailed at Government Code section 12926, subdivision (s), and set forth below at California Code of Regulations, title 2, section 7294.0, subdivision (b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, 12945.1 and 12945.2, Government Code and; ~~American National Ins. Co. v. Fair Employment and Housing Com. (1982) 32 Cal. 3d 603, 608-10 and;~~ Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.), as amended by the ADA Amendments Act of 2008 (Public Law 110-325) and its implementing regulations at 29 C.F.R. § 1630 et seq.; Family and Medical Leave Act of 1993 (Public Law 103-3) (29 U.S.C. § 2601 et seq.) and its implementing regulations at 29 C.F.R. § 825 et seq.; and Individuals with Disabilities Education Act (Pub. L. No. 101-476) (20 U.S.C. § 1400 et seq.) as amended, and its implementing regulations, at 34 C.F.R. § 300.8.

§ 7293.7. Establishing Disability Discrimination.

Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is ~~an~~ a qualified individual with a disability, who can perform the essential functions of the job with or without reasonable accommodation and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 7293.8 of this part.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7293.8. Defenses.

(a) In addition to any other defense provided ~~herein~~ in these disability regulations, any defense permissible under Subchapter 1, at California Code of Regulations, title 2, section 7286.7, shall be applicable to this subchapter.

~~(b) Inability to Perform. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation which would allow after reasonable accommodation has been made, the applicant or employee cannot to perform the essential functions of the position in question because of his or her disability.~~

~~(c)~~ (b) Health or Safety of an Individual With a Disability. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow after reasonable accommodation has been made the applicant or employee to cannot perform the essential functions of the position in question in a manner which would not endanger his or her health

or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.

~~(d)~~ (c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow ~~after reasonable accommodation has been made,~~ the applicant or employee ~~cannot~~ to perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job.

~~(e)~~ (d) Future Risk. However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, ~~and the individual is able to safely perform the job over a reasonable length of time. "A reasonable length of time" is to be determined on an individual basis.~~

~~(f)~~ (e) Factors to be considered when determining the merits of the defenses enumerated in Section 7293.8, subdivisions (b)-(d) ~~(e)-(e)~~ include, but are not limited to:

(1) ~~Nature~~ Limitation(s) of the disability;

(2) Length of the training period for the position relative to the length of time the employee has been employed or is expected to be employed;

(3) Type of time commitment, if any, routinely required of all other employees for the job in question; and

(4) Normal workforce turnover.

~~(g)~~ (f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. ~~"Essential functions" does not include the marginal functions of the position.~~

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

- (2) Evidence of whether a particular function is essential includes, but is not limited to, the following:
- (A) The employer's or other covered entity's judgment as to which functions are essential.
 - (B) Accurate, current written ~~Written~~ job descriptions ~~prepared before advertising or interviewing applicants for the job.~~
 - (C) The amount of time spent on the job performing the function.
 - (D) The legitimate business consequences of not requiring the incumbent to perform the function.
 - (E) The terms of a collective bargaining agreement.
 - (F) The work experiences of past incumbents in the job.
 - (G) The current work experience of incumbents in similar jobs.
 - (H) Reference to the importance of the performance of the job function in prior performance reviews.
- (3) “Essential functions” do not include the marginal functions of the position. “Marginal functions” of an employment position are those which, if not performed, would not eliminate the need for the job or which could be readily performed by another employee.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7293.9. Reasonable Accommodation.

~~(a) Examples of Reasonable Accommodation. Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:~~

- ~~(1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;~~
- ~~(2) Job restructuring, reassignment to a vacant position, part time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.~~

(a) Affirmative Duty. An ~~Any~~ employer or other covered entity ~~shall~~ has an affirmative duty to make reasonable accommodation ~~to~~ for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other

covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.

~~(b) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:~~

- ~~(1) the nature and cost of the accommodation needed;~~
- ~~(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;~~
- ~~(3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;~~
- ~~(4) the type of operations, including the composition, structure, and functions of the workforce of the entity;~~
- ~~(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.~~

(b) An accommodation includes:

- (1) Modifications or adjustments to a job application process that are effective in enabling an applicant with a disability to be considered for the position such applicant desires; or
- (2) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that are effective in enabling an employee with a disability to perform the essential functions of that position;
or
- (3) Modifications or adjustments that are effective in enabling a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

~~(c) Accessibility Standards. To comply with Section 7293.9(a), the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, Title 24, pursuant to Chapter 7 (commencing with Section 4450), Division 5 of Title 1 of the Government Code and Part 5.5 (commencing with Section 19955) and Division 13 of the Health and Safety Code.~~

(c) No lowering of standards required. An employer or other covered entity is not required to lower its quality and quantity of work as an accommodation, but may need to accommodate

an employee with a disability to enable him or her to meet its standards for quality and quantity.

(d) Examples of Reasonable Accommodation. Reasonable accommodation which is effective in enabling an applicant with a disability to be considered for a job or an employee with a disability to perform the essential functions of a job may, but does not necessarily, include, nor is it limited to, such measures as:

(1) Accessibility. Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to:

(A) Providing accessible break rooms, restrooms, training rooms, or reserved parking places.

(B) Acquiring or modifying furniture, equipment or devices or making other similar adjustments in the work environment.

(C) Allowing applicants or employees to bring assistive animals to the work site.

(D) Transferring an employee to a more accessible worksite;

3) Providing qualified readers or interpreters to an applicant or employee.

(2) Job Restructuring. This may include, but is not limited to:

(A) reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(B) part-time or modified work schedules;

(C) alteration of when and or how an essential function is performed;

(D) adjustment or modification of examinations, training materials or policies; and

(E) other similar actions.

(F) An employer or other covered entity is not required to excuse the employee from performing the essential functions of the job or permanently restructure the job.

(3) Paid or unpaid leave. Where the employee cannot presently perform the essential functions of the job, holding a job open for an employee on a leave of absence or extending a leave provided by the California Family Rights Act, the federal Family and Medical Leave Act, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective at allowing the employee to return to work at the end of the leave, and does not create an undue hardship for the

employer. If there is no demonstration that the leave is likely to be effective at allowing the employee to return to work at the end of the leave or it creates an undue hardship for the employer to continue the leave, the employer can replace the employee and terminate his or her employment.

(4) Reassignment to a vacant position. As a reasonable accommodation, an employer or other covered entity shall ascertain and offer an employee alternate, suitable vacant positions, for which the employee is qualified, under the following circumstances:

(A) if the employee can no longer perform the essential functions of his or her own position even with accommodation;

(B) if accommodation of the essential functions of an employee's own position creates an undue hardship; or

(C) if an employee requests reassignment to gain access to medical treatment for his or her disabling condition(s) not easily accessible at the current location; and

(D) if there are no accommodations that would enable the employee to remain in the current position and there are no funded, vacant comparable positions for which the individual is qualified with or without reasonable accommodation, an employer or other covered entity may reassign an individual to a lower graded or lower paid position.

(E) Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, an employer or other covered entity may offer, and an employee may choose to accept or reject a temporary assignment during the interactive process.

(F) The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees.

(G) The employer or other covered entity is not required to create a new position to accommodate an employee with a disability.

(H) Ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its seniority system, absent a showing that special circumstances warrant a finding that the requested "accommodation" is "reasonable" on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority system.

(5) Any and all reasonable accommodations. An employer or other covered entity is required to consider any and all reasonable accommodations, except ones that create an undue hardship. The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to select and implement the accommodation that is most appropriate for both the employee and the employer or other

covered entity.

- (e) Reasonable Accommodation for a Past Disability. An individual with a record of a disability may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.
- (f) Accessibility Standards. To comply with section 7293.9, subdivision (d)(1), of this part, the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, title 24, pursuant to Chapter 7 (commencing with Government Code section 4450), and Division 13 of the Health and Safety Code (commencing with Government Code section 17000).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.0. Undue Hardship.

- (a) It is a permissible defense to a failure to provide reasonable accommodation claim for an employer or other covered entity to prove that providing accommodation to an applicant or employee with a disability would have created an undue hardship.
- (b) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of any of the following factors:
- (1) the nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
 - (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business;
 - (3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;
 - (4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity;
 - (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920,

12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.1. Interactive Process.

(a) Interactive Process. The Act requires a timely, good faith, interactive process between an employer or other covered entity and an applicant or employee with a known physical or medical disability or medical condition to determine an effective, reasonable accommodation. Both the employer or other covered entity and the applicant or employee must exchange essential information identified below without delay or obstruction of the process.

(b) Notice. An employer or other covered entity must initiate an interactive process when:

(1) an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodations, or

(2) the employer or other covered entity otherwise becomes aware of the need for an accommodation through a third party or by observation, or

(3) the employer or other covered entity becomes aware of the possible need for an accommodation because the employee has exhausted leave through workers' compensation, the federal Family and Medical Leave Act, the California Family Rights Act, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that further accommodation is still necessary. An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, title 2, section 7297.4, subdivision (b)(1) & (b)(2)(A)(1), prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."

(c) Obligations of Employer or Other Covered Entity. An employer or other covered entity must engage in a timely, good faith, interactive process as follows:

(1) The employer or other covered entity shall either grant the applicant's or employee's requested accommodation, or reject it after due consideration, and initiate discussion with the applicant or employee regarding alternative accommodations;

(2) If the applicant or employee has not already provided the employer or other covered entity with a concise list of limitation(s) or restriction(s) which must be met to accommodate the applicant or employee, the employer or other covered entity shall ask the applicant or employee to provide one;

(3) the employer or other covered entity shall not ask the applicant or employee about the underlying medical cause of any limitation or restriction, but may require medical information, as set forth in section 7294.3 below, and second opinions;

- (4) If information provided by the applicant or employee needs clarification, then the employer or other covered entity shall identify the issues that need clarification, specify what further information is needed, and allow the applicant or employee a reasonable time to produce the supplemental information;
- (5) The employer or other covered entity shall analyze the particular job involved and the essential functions that are actually performed;
- (6) In consultation with the applicant or employee to be accommodated, the employer or other covered entity shall identify potential accommodations and assess the effectiveness each would have in enabling the applicant to have an equal opportunity to participate in the application process and to be considered for the job; or for the employee to perform the essential function of the position held or desired;
- (7) The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, and select but has the right to implement the accommodation that is most appropriate for both the employee and the employer or other covered entity; and
- (8) If reassignment to an alternate position is considered as an accommodation, the employer or other covered entity may ask the employee to provide information about his or her educational qualifications and work experience that may help the employer find a suitable alternative position for the employee, and shall comply with section 7293.9, subdivision (d)(4).
- (d) Obligations of Applicant or Employee. The applicant or employee has the responsibility to cooperate in good faith with the employer or other covered entity, including providing relevant information (including relevant and appropriate medical information) requested by the employer or other covered entity, as follows:
- (1) Relevant medical information is health care provider documentation of a concise list of restriction(s) which must be met to accommodate the employee. Disclosure of the nature of the disability is not required.
- (2) If reassignment to an alternate position is considered as an accommodation, the employee shall provide the employer or other covered entity information about his or her educational qualifications and work experience that may help the employer or other covered entity find a suitable alternative position for which the employee is qualified.
- (3) An employee's mental or physical inability to engage in the interactive process while on leave does not constitute a breakdown in the interactive process;
- (4) Direct communications between the employer or other covered entity and the applicant or employee rather than through third parties are preferred, but not required.

(5) Required medical information. When reasonable accommodation is requested because of an applicant's or employee's disability, and the disability and the type of accommodation needed are not obvious, an employer or other covered entity may require an applicant or employee to obtain relevant medical documentation from a health care provider that sets forth the following information:

(A) The name and medical credentials of the health care provider and his or her type of medical practice or specialization;

(B) That the employee has a disability, describing the limitation(s) of the disability, how the limitation(s) affect(s) the applicant's ability to have an equal opportunity to participate in the application process and to be considered for the job, or the employee's ability to perform the employee's job duties, and substantiates why the requested reasonable accommodation is needed. The employer or other covered entity cannot ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records, because those records may contain information unrelated to the need for accommodation.

(C) If an applicant or employee provides insufficient documentation in response to the employer's or other covered entity's initial request, the employer or other covered entity shall explain why the documentation is insufficient and allow the applicant or employee an opportunity to provide the supplemental information in a timely manner before requiring that an employee visit a company-provided doctor. The employer or other covered entity also may consider consulting with the employee's doctor (with the employee's narrowly tailored written consent) before requiring the employee to go to a health care professional of its choice.

1) Documentation is insufficient if it does not describe the functional limitation(s) of the applicant or employee that may entitle the applicant or employee to reasonable accommodation.

2) Documentation also might be insufficient where: the health care professional does not have the expertise to give an opinion about the applicant's or employee's medical condition and the limitation(s) imposed by it; the information does not specify the functional limitation(s) due to the disability; or, other factors indicate that the information provided is not credible or is fraudulent.

(6) If an applicant or employee provides insufficient documentation, as described above, an employer or other covered entity does not have to provide reasonable accommodation until sufficient documentation is provided.

(7) Any medical examination conducted by the employer's and other covered entity's health care professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation.

(8) If an employer or other covered entity requires an employee to go to a health care provider of the employer's or other covered entity's choice, the employer or other covered entity must pay all costs and wages associated with the visit(s).

(9) If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's disability, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

(10) If an employee requests leave on an intermittent or reduced schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

(e) An employer or other covered entity shall assess individually an employee's ability to perform the essential functions of his or her job either with or without accommodation rather than substitute a "100% healed" or "fully healed" policy before the employee can return to work after an illness or injury.

(f) If an employee requests permission to bring an assistive animal into the workplace as a reasonable accommodation, prior to allowing the animal to be in the workplace, the employer may require that the employee supply:

(1) a letter from the employee's health care provider stating that the employee has functional limitation(s) requiring the presence of the assistive animal in the workplace; and

(2) signed statements from one or more independent, professional animal trainers that they have witnessed that the animal is well-behaved and performs the task(s) it was trained to do to assist the employee with the disability.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.0. § 7294.2. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider ~~individuals~~ applicants with or without disabilities on an equal basis ~~with individuals with disabilities~~ for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize an employment benefit in any way which discourages or is designed to discourage ~~individuals~~ applicants with disabilities to a greater extent than applicants without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from ~~individuals applicants~~ with or without disabilities equally ~~with applications from individuals without disabilities.~~ Where applications are being accepted in the normal course of business, an application from an individual with a disability must be accepted.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or in the course of the selection process. Examples of prohibited inquiries are:

(A) “Do you have any particular disabilities?”

(B) “Have you ever been treated for any of the following diseases or conditions?”

(C) “Are you now receiving or have you ever received workers’ compensation?”

(D) “What prescription medications are you taking?”

(E) “Have you ever had a job-related injury or medical condition?”

(3) Permissible Job-Related Inquiry. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.), as amended by the ADA Amendments Act of 2008 (Pub. Law 110-325) and the regulations adopted pursuant thereto, nothing in Government Code section 12940, subdivision (d), or in this subdivision, shall prohibit any employer or other covered entity from making, in connection with prospective employment, an inquiry as to whether the applicant can perform job-related functions ~~or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.~~ An employer or other covered entity may make an inquiry as to any limitation(s) of an applicant who requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of ~~individuals applicants~~ with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

~~§7294.0(d)~~ § 7294.3. Medical Examination. Examinations.

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical examination of an applicant before an offer of employment is extended to that applicant. A medical examination includes a procedure or test that seeks information about an individual's physical or mental conditions or health but does not include testing for current illegal drug use.

(b) Post-Offer. An employer or other covered entity may condition a real offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty in order to determine fitness for the job in question. For a job offer to be real, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

~~(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records, except that:~~

~~(A) Supervisors and managers may be informed of restrictions on the work or duties of individuals with disabilities and necessary accommodations; and~~

~~(B) First aid and safety personnel may be informed, where appropriate, that the condition might require emergency treatment.~~

(c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical examination only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical Examinations and Disability Inquiries During Employment.

(1) An employer or other covered entity may make disability-related inquiries and require medical examinations of employees that are both job-related and consistent with business necessity.

(A) An inquiry is "job-related" when it is narrowly tailored to assess the employee's ability to carry out the essential functions of his or her job, or to determine whether an employee poses a direct threat due to a medical condition.

(B) An inquiry is “consistent with business necessity” when the need for the disability inquiry or medical examination substantially promotes a vital business goal.

(C) An employer or other covered entity has the burden of proving through reliable, objective evidence that a disability-related inquiry or medical examination is both job-related and consistent with business necessity.

(2) Fitness for Duty Examination. If the employer or other covered entity requires an employee to undergo a fitness-for-duty examination, the employer or other covered entity must ensure that whatever medical inquiries are made are related to the essential functions of the employee’s job.

(3) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently uses drugs illegally or uses medical marijuana is not protected under the FEHA; therefore, questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using drugs illegally, are protected from being discriminated against because of their disability under the FEHA.

(4) Other Acceptable Disability-related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; and, (3) has no power to affect employment decisions.

(B) Compliance with Another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by another federal or state law or regulation; such as, medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers, or medical requirements for airline pilots and flight attendants.

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program without having to

show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is “voluntary” as long as an employer neither requires participation nor penalizes employees who do not participate.

(5) Maintenance of Medical Files. Information obtained regarding the medical condition or history of the employee are to be maintained on separate forms and in separate medical files and shall be accorded confidentiality as medical records, except that:

(A) supervisors and managers may be informed of restriction(s) on the work or duties of employees with disabilities and necessary accommodations; and

(B) first aid and safety personnel may be informed, where appropriate, that the condition might require emergency treatment.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.1. § 7294.4. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an ~~individual~~ applicant or employee with a disability.

~~(b) Testing.~~

~~(1) An employer or other covered entity shall not make use of any testing criterion that discriminates against individuals with disabilities, unless:~~

~~(A) The test score or other selection criterion used is shown to be job-related for the position in question; and~~

~~(B) An alternative job-related test or criterion that does not discriminate against individuals with disabilities is not available.~~

~~(2) Tests of physical agility or strength shall not be used unless the physical agility or strength measured by such test is related to job performance.~~

~~(3) An employer or other covered entity shall select and administer tests concerning employment so as to best ensure that, when administered to any individual, including an individual with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills~~

are the factors that the tests purport to measure. To accomplish this end, reasonable accommodation must be made in testing conditions. For example:

- ~~(A) The test site must be accessible to applicants with a disability.~~
 - ~~(B) For blind persons, an employer or other covered entity might translate written tests into Braille, provide or allow the use of a reader, or provide oral presentation of the test.~~
 - ~~(C) For quadriplegic individuals, an employer or other covered entity might provide or allow someone to write for the applicant or to allow oral responses to written test questions.~~
 - ~~(D) For individuals with a hearing impairment, an employer or other covered entity might provide or allow the services of an interpreter.~~
 - ~~(E) For individuals whose disabilities interfere with their ability to communicate, an employer or other covered entity might allow additional time to complete the examination.~~
 - ~~(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent advice should be sought before attempting such modification since the validity of the test may be affected.~~
- ~~(4) Where reasonable accommodation is appropriate, an employer shall permit the use of readers, interpreters, or similar supportive individuals or instruments.~~

(b) Qualification standards, tests, and other selection criteria.

- (1) In general. It is unlawful for an employer or a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.
- (2) Qualification Standards and Tests Related to Uncorrected Vision. An employer or other covered entity shall not use qualification standards, employment tests, or other selection criteria based on an applicant's or employee's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.
- (3) Qualification Standards and Tests Related to Hearing. An employer or other covered entity shall not use qualification standards, employment tests, or other selection criteria based on an applicant's or employee's uncorrected hearing unless the standard, test, or

other selection criteria, as used by the employer or other covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(4) An employer or other covered entity shall not make use of any testing criterion that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable.

(5) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is related to job performance.

(6) An employer or other covered entity shall select and administer tests concerning employment so as to best ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills are the factors that the tests purport to measure. To accomplish this end, reasonable accommodation must be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity might translate written tests into Braille, provide or allow enlarged print, real time captioning, or digital format, provide or allow the use of a human reader or a screen reader, provide or allow the use of other computer technology, or provide oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity might provide or allow someone to write for the applicant or employee, provide or allow voice recognition software, provide or allow the use of other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity might provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process, communicate, an employer or other covered entity might allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent advice should be sought before attempting such

modification since the validity of the test may be affected.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity shall permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic characteristics.

It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, unless such test is based upon a bona fide occupational qualification or applicable security regulations established by the federal government or the State of California.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

~~§7294.2.~~ § 7294.5. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.